Supreme Court, U.S.
FILED
DEC 18 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-896

In The
Supreme Court Of The United States

OCTOBER TERM, 1985

CAROL C. JOHNSON,
Petitioner,

v.

LINDEN SHORE DISTRICT,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN E. DONEGAN, ESQUIRE
Attorney for Respondent
Linden Shore District
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P.O. Box 811
Branford, Connecticut
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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Connecticut Supreme Court, and/or Appellate Court of the State of Connecticut, and/or the Superior Court of the State of Connecticut have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the supervisory provisions of the United States Supreme Court?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
CASES AND AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF THE CASE	2
ARGUMENT	4
CONCLUSION	7

APPENDIX

1. Letter from United States Supreme Court concerning extension of time to file Petition for Writ of Certiorari 1a

2. Order of Supreme Court of the State of Connecticut Dismissing Motion to Reargue and Reopen 2a

3. Order of Supreme Court of the State of Connecticut Denying Petition for Certification to Appeal 3a

PAGE

APPENDIX

4. Per Curiam Decision of the Appellate Court of the State of Connecticut Finding No Error in Decision of Superior Court . . . 4a

5. Memorandum of Decision of Connecticut Superior Court 5a

6. Memorandum of Decision on Defendant's (Petitioner herein) Motion For Order Dismissing Complaint (No. 129) 10a

TABLE OF AUTHORITIES

	PAGE
Constitution of the United States, Amendment XIV Sec. 1	4
Constitution of Connecticut Article First Section 8	4
STATUTORY PROVISIONS	
28 U.S.C. §1257	4
Connecticut General Statutes, §764, Rev. 1949	2
Connecticut General Statutes, §765, Rev. 1949	2
Connecticut General Statutes, §7-325, Rev. 1958	2
Connecticut General Statutes, §7-326, Rev. 1958	2
CASES	
Tacon v. Arizona, 140 U.S. 351 (1973) . . .	6

OPINIONS BELOW

The Memorandum of Decision of the trial court is set forth in the Appendix to Respondent's Brief on page 5a.

The citation to the decision of the Appellate Court of the State of Connecticut is as follows: Linden Shore District v. Carol C. Johnson, 4 Conn. App. 225 (1985).

The citation to the decision of the Supreme Court of the State of Connecticut is as follows: Linden Shore District v. Carol C. Johnson, 197 Conn. 803 (1985).

STATEMENT OF THE CASE

The respondent is an erosion control district formed in 1959 under the Connecticut General Statutes, §764, Rev. 1949 (now §7-325), with the power to levy and collect taxes. The district was formed in 1959 and consisted of an area within the Town of Branford adjacent to Long Island Sound. Pursuant to the powers granted it under the Connecticut General Statutes, §765 et seq., Rev. 1949 (now §7-326) et seq., the plaintiff has assessed taxes against and issued tax bills to those members of the respondent owning property within its district boundaries.

The respondent issued tax bills to the petitioner for the tax years October 1, 1971 through October 1, 1979, inclusive. At no time did the petitioner make any payment and the

respondent, in a timely fashion each year, placed tax liens on the Branford Land Records against the petitioner's property in the amount of said taxes due.

On October 14, 1981, the respondent instituted an action against the petitioner to foreclose the tax liens filed against the petitioner for the tax years October 1, 1971, through October 1, 1979. The petitioner has never made any payment on the taxes so assessed, levied and foreclosed upon nor on any other tax assessed by the respondent in any tax year since the formation of the district. The petitioner claims that the respondent was not properly formed under the statutes so provided.

ARGUMENT

The petitioner has filed his Petition for Writ of Certiorari in this Court alleging that he has been denied due process of law and equal protection of the law under the United States Constitution and the Connecticut Constitution. U.S. Constitution, Amdt. XIV, Section I, Connecticut Constitution, Art. First, Section 8. Basically, and briefly, the petitioner claims that the trial court in Connecticut did not find the facts in this case, after a trial, to be supportive of the petitioner's claims and, therefore, the petitioner was denied due process and equal protection.

The petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1257 and under the Rules of the Supreme Court. Rules of Supreme

Court, Rule 17. The Rules of this Court specifically state that "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore." Rules of Supreme Court, Rule 17.

It is submitted that the petitioner has not demonstrated the need for this Court to exercise its judicial discretion in the granting of the petitioner's writ. The facts, issues and arguments contained within the petition were all made before the trial court, the Appellate Court of the State of Connecticut and the Supreme Court of the State of Connecticut. The facts and arguments are all referred to by Judge Levine in his Memorandum of Decision, both on the Motion to Dismiss and on the merits of the case in chief. See Appendix, p. 10a. The petitioner herein is

seeking a further review of the facts by this Court. Where the only issues raised by the petitioner are factual this Court will dismiss the petition as one that does not justify the exercise of its jurisdiction. Tacon v. Arizona, 140 U.S. 351 (1973).

CONCLUSION

The respondent herein respectfully represents that the petitioner has not established any special or important reasons for this Court to exercise its discretionary powers to grant petitioner's writ of certiorari and is merely attempting a further review of the facts by another Court.

The respondent respectfully requests this Court to deny the petition for writ of certiorari.

Respectfully submitted,

JOHN E. DONEGAN
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APPENDIX

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 28, 1985

Ms. Carol C. Johnson
600 West 111th Street
New York, NY 10025

Re: Carol Clement Johnson v. Linden Shore District, A-315

Dear Ms. Johnson:

Your application for an extension of time in which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Marshall, who on October 28, 1985, signed an order extending your time to and including November 19, 1985.

A copy of the Justice's order is enclosed.

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk

By _____
Edward L. Turner, Jr.
Assistant Clerk

vm
Enc.

cc(letter only): John E. Donegan, Esq.

SUPREME COURT—SUPREME COURT
STATE OF CONNECTICUT

July 31, 1985

No. PSC-85-1001

LINDEN SHORE DISTRICT

v.

CAROL C. JOHNSON

ORDER

THE MOTION OF THE DEFENDANT, FILED JULY 29, 1985, TO REARGUE AND TO REOPEN THE DECISION AND TO INCLUDE REPLY, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY

ORDER DENIED.

By the Court,

FRANCIS J. DRUMM, JR.
Chief Clerk

BY: MICHELE L. ANGERS
Assistant Clerk-Appellate

NOTICE SENT: 7-31-85
Carol C. Johnson, pro se
John E. Donegan

SUPREME COURT
STATE OF CONNECTICUT

No. PSC-85-1001

Linden Shore District

v.

Carol C. Johnson

ORDER ON PETITION FOR
CERTIFICATION TO APPEAL

On consideration of the petition by the defendant for certification to appeal from the Appellate Court (4 Conn. App. 225) it is hereby ordered that said petition be, and the same hereby is denied.

By the Court,

FRANCIS J. DRUMM, JR.
Chief Clerk

By CYNTHIA M. GWOUK
Assistant Clerk-Appellate

Dated: July 17, 1985

Notice to: 7-18-85
Clerk, Superior Court, New Haven—198891
Clerk, Appellate Court
Carol C. Johnson, pro se
John E. Donegan

Carol C. Johnson in support of petition—*John E. Donegan* in opposition.

ldc

LINDEN SHORE DISTRICT

v.

CAROL C. JOHNSON

(3321)

HULL, BORDEN and SPALLONE, JS.

Argued May 9—decision released June 11, 1985

Action to foreclose municipal tax liens on land owned by the named defendant, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Levine, J.;* judgment of strict foreclosure, from which the named defendant appealed to this court. *No error.*

Carol C. Johnson, pro se, the appellant (named defendant).

John E. Donegan, for the appellee (plaintiff).

PER CURIAM. We have reviewed the record and have closely examined the file and briefs[1] in this case. We find nothing to substantiate the named defendant's claim of error.

There is no error, but the case must be remanded with direction to modify the judgment by fixing new law days.

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1 During the course of the appeal, we denied the plaintiff's motion to strike the brief of the named defendant, without prejudice to the right of the plaintiff to renew its motion at the time of oral argument. The plaintiff renewed its motion. We again deny it.

Reported in 4 Conn. App. 225

[Filed May 15, 1984—George M. Fasanella, Asst. Clerk]

SUPERIOR COURT
JUDICIAL DISTRICT OF NEW HAVEN
AT NEW HAVEN

MAY 14, 1984

No. CV-81-0198891-S

LINDEN SHORE DISTRICT

v.

CAROL CLEMENT JOHNSON, ET AL.

MEMORANDUM OF DECISION

I

Plaintiff Linden Shore District is a District, organized and existing, pursuant to Sec. 7-325, *Gen. Stats.*, and is located in Branford. As to the purposes and functions of such a District, see Sec. 7-326, *Gen. Stats.* Sec. 7-325, *Gen. Stats.*, controls the procedure for establishing a District, such as Plaintiff.

The amended Complaint herein, dated January 17, 1984 (Pleading #126), seeks foreclosure of certain tax liens of Plaintiff against Defendant Johnson's residential property, located within said District. The tax years involved are October 1, 1971 - October 1, 1979, inclusive. As of the date of trial, in March, 1984, Plaintiff claims that the principal sum of $2,246.67 is due to its said liens, plus certain interest, costs, and fees. Sec. 187, *Practice Book*.

Plaintiff's real estate expert, John Dendas, testified, without contradiction, that the fair market value of Defendant Johnson's premises was $122,000.00, as of the time of trial. The amended Complaint recites that the only additional encumbrance on the premises is an attachment of Irving H. Perlmut-

ter, dated August 18, 1983, in the sum of $8,500.00. Under date of January 9 1984, said Perlmutter filed a Statement of No Defense.

Defendant Johnson appeared *pro se*. However, he alleged that he was an attorney, duly admitted to practice in the State of New York.

Any further reference herein to "Defendant", shall be deemed to pertain solely to Defendant Johnson, unless specific reference is hereafter made, by name, to Defendant Perlmutter.

II

At the conclusion of all the evidence, Defendant Johnson made oral and written Motions to dismiss this action. His written Motion dated March 30, 1984, (#129), requested an Order, dismissing the Complaint. His Motion stated: "The ground being that there is no Plaintiff. 'Linden Shore District' is not a District."

Defendant Johnson urged, in Motion #129, that since Plaintiff has no legal existence, therefore, it is not qualified to prosecute the instant action against him. Defendant Johnson submitted that Plaintiff did not fully comply, at the outset, with the procedure in Sec. 7-325, *Gen. Stats.*, relative to formation of Districts. Defendant Johnson asserted that the claimed defects in organization of Plaintiff, dating back to 1959, are "jurisdictional," and thus operate to nullify the instant foreclosure action.

Pursuant to a Memorandum of Decision of this Court, dated May 11, 1984, (#139), the Court denied Defendant Johnson's said Motion to Dismiss. (#129). The contents of said Memorandum of Decision are incorporated herein, with the same force and effect as if set forth herein at length.

III

Defendant Johnson also filed a post-trial Motion (#133) to offer a deed of real property in evidence. The grantor in said deed was the First Ecclesiastical Society of the Town of

Branford, and the grantee was Linden Shore District, Plaintiff herein. The deed was dated January 9, 1961, and was recorded on January 10, 1961.

In its Memorandum of Decision dated May 11, 1984, (#140), this Court denied Defendant Johnson's post-trial Motion, (#133) to offer said deed in evidence. The Court's said Memorandum of Decision is likewise incorporated herein by reference, with the same force and effect as if fully set forth herein.

IV

Both parties filed voluminous briefs, following conclusion of the instant trial.

Plaintiff asserted that the basic allegations of an action to foreclose a municipal tax or assessment lien are contained in Sec. 187, *Practice Book*, and that it had fully complied with the requirements set forth therein. Plaintiff stressed that portion of Sec. 187, which states that any claimed informality, irregularity or invalidity in the assessment, or attempted collection, of the tax, or in the lien filed, shall be matter of affirmative defense, to be alleged and proved by Defendant Johnson.

Plaintiff maintained that it had fully and completely complied with the terms and conditions of Sec. 187. Plaintiff introduced a number of exhibits, by way of rebutting Defendant Johnson's claim that in 1959, (about twenty-four years ago), improper, inadequate, or illegal notice of the matter of formation of Plaintiff District had been given. Sec. 7-325, *Gen. Stats.*

V

Defendant Johnson's post-trial brief, dated April 13, 1984, (#134) essentially makes one argument. He once again claims defects in the posting of notices in 1959, relative to the original formation of Plaintiff District.

The Court had already ruled on these contentions of Defendant Johnson, when it denied his Motion #129, which sought an Order dismissing the Complaint. There is no merit in

repeating herein the contents of the Court's prior Memorandum. Said comments and conclusions likewise apply to Defendant Johnson's identical allegations, as contained in the main portion of his instant post-trial brief.

However, it should be noted that Defendant Johnson's allegations, as to lack of subject matter jurisdiction, are not actually germane to his Special Defense, that Plaintiff was not duly and properly organized. Defendant Johnson's instant argument is, in reality, much more restricted than a jurisdictional one. The plain fact is that he is making an unrelated, and non-jurisdictional, contention, to wit, that Plaintiff lacked legal capacity to commence the instant lawsuit. In any event, there is no credible evidence to support Defendant Johnson's allegations on this issue.

VI

Defendant Johnson also filed a one-page Addendum to his post-trial brief, and a Supplement to his trial brief, dated April 21, 1984 (#138). He attempted therein to present a number of arguments; repeating most, if not all, of the Special Defenses contained in his Answer.

The contents of his Addendum and Supplement do not assist Defendant Johnson. First, they lack persuasive evidence, in support thereof. Next, they are not pertinent to the legal requirements, for prosecuting a tax foreclosure claim of this type, and any proper defenses thereto. Finally, in these two documents, Defendant Johnson does not cite any legal authorities whatsoever, other than Sec. 7-325, to bolster his contentions. A detailed commentary on the text of the Addendum and Supplement would, therefore, serve no useful purpose.

VII

The more credible evidence supports Plaintiff's contentions herein. Defendant Johnson failed to sustain his burden of proof, relative to his Special Defenses. The Court concludes that Plaintiff is entitled to a judgment in its favor, authorizing it to foreclose the tax liens described in its amended Complaint.

A Judgment of Strict Foreclosure of said liens may, therefore, enter in favor of Plaintiff, and against Defendant Johnson. The Court finds the debt, for the liens involved, to be $2,246.67, exclusive of interest and taxable costs, as allowed by law.

The fair market value of the instant premises is found to be $122,000.00

VIII

Reference is now made to the problems of fees, costs, and a law day.

The Court will allow an appraiser's fee of $250.00, covering services of John Dendas, as Plaintiff's expert, and will establish a law day of June 3, 1985, as to Defendant Johnson, with subsequent days for subsequent encumbrances.

Relative to an attorney's fee for Plaintiff, Plaintiff requested a $5,000.00 fee. Plaintiff's counsel asserted in his brief dated April 9, 1984, that he did spend roughly 50.4 hours relative to this case, including preparation for trial, time on trial, and the preparation and filing of final briefs.

In the opinion of the Court, the $5,000.00 fee is substantially in excess of a fair allowance, under all the circumstances herein. Sec. 12-193, *Gen. Stats.*, permits a municipality to recover reasonable attorney's fees, arising out of a tax foreclosure proceeding. However, it must be remembered that the principal debt herein is merely $2,246.67.

When the Court is confronted with the difficult problem of fixing a fair and reasonable counsel fee, the time spent by the claimant's attorney is obviously a major and legitimate consideration. In addition, the Court has to bear in mind other factors, such as the amount in controversy, as bearing on the reasonable amount of legal fees. *Burritt Mut. Savings Bank* v. *Tucker*, 183 Conn. 369, 376.

Under the circumstances, the Court will allow a counsel fee of $1,750.00, as a fair and reasonable sum, for the services performed to date herein by Plaintiff's counsel.

/s/ LEVINE, J.

Levine, J.

[Filed May 14, 1984—George M. Fasanella, Asst. Clerk]

SUPERIOR COURT
JUDICIAL DISTRICT OF NEW HAVEN
AT NEW HAVEN

MAY 11, 1984

NO. CV 81-0198891-S

LINDEN SHORE DISTRICT

v.

CAROL CLEMENT JOHNSON

MEMORANDUM OF DECISION ON DEFENDANT'S MOTION FOR ORDER DISMISSING COMPLAINT (NO. 129)

I

Preliminary Statement

Plaintiff is a District, organized and existing pursuant to Sec. 7-325, *Gen. Stats.*, and is located in Branford. The purposes and functions of such a District are outlined in Sec. 7-326, *Gen. Stats.* The procedure for establishing a District is contained in Sec. 7-325, *Gen. Stats.*

In 1981, Plaintiff commenced this action to foreclose certain of its tax liens (from October 1, 1971 - October 1, 1979) against Defendant's residential property, located within said District. As of the date of trial, in March, 1984, the amount claimed due by Plaintiff on its liens was $2,246.67, plus certain interest, costs and fees. Sec. 186-187, *Practice Book*.

Defendant appeared *pro se*. He alleged that he was an attorney, duly admitted to practice in the State of New York.

The case proceeded to trial in March, 1984. At the conclusion of Plaintiff's evidence, Defendant made an oral Motion to

Dismiss the case, based on a claimed lack of jurisdiction of this Court to hear the case, because, "The Plaintiff is not a legal entity". The Court denied Defendant's oral Motion. Defendant's oral Motion did not make it clear whether he was challenging the Court's jurisdiction over his person, or, in the alternative, the Court's jurisdiction over the subject matter. See Sec. 142, 143, and 145, *Practice Book*.

At the conclusion of all the evidence, Defendant made a second oral Motion to dismiss this action, because, "The Plaintiff is not a legal entity". The Court directed Defendant to file a written Motion, and to comply with Sec. 142, *Practice Book, et seq.*, relative to such Motions, insofar as they were applicable. Sec. 143, *Practice Book*, mandates that such a Motion must be in writing. Defendant did file a written Motion dated March 30, 1984, and, once again, moved for dismissal of the Complaint. The text of his Motion states, in part, "The ground being that there is no Plaintiff. Linden Shore District is not a District".

Defendant's basic claim is that Plaintiff has no legal existence, because it did not comply, at the outset, with the procedure in Sec. 7-325, *Gen. Stats.*, relative to formation of Districts. He asserts that the procedures for formation of the District must be approved at a meeting, or at a hearing. He urges that said hearing must be called by posting a notice thereof, and that lack of such posting is "jurisdictional".

Defendant further argued, at trial, that there was no proof whatsoever of proper posting of notice of the organization meeting, pursuant to the controlling statutes.

Once again, it is not clear, from the contents of Defendant's Motion dated March 30, 1984 (#129), whether he is challenging jurisdiction of his person, or jurisdiction over the subject matter, to wit, *in rem*. If his Motion is viewed as an attack on *in personam* jurisdiction, it appears that he has waived his right thereto. Sec. 142, *Practice Book*.

Nevertheless, the Court has determined to give Defendant some latitude, and to rule on and interpret his Motion, by classifying it as an objection to subject matter jurisdiction. An *in rem* objection may be raised at any time. Sec. 145, *Practice Book*.

Under Sec. 145, *Practice Book*, any claim of lack of jurisdiction over the subject matter cannot be waived. However, it appears that on March 17, 1982, Defendant filed a General Appearance, thereby submitting himself to the jurisdiction of the Court, at that time. He did not press vigorously any jurisdictional challenges, of any type, until the time of trial, in March, 1984, as summarized hereinabove.

II

The Posting Issue

A decisive answer to Defendant's contention is found in Plaintiff's Exhibit A, which was admitted in this case. Exhibit B to that Exhibit, to wit, an "Affidavit of Notice", is very significant. The contents of said Affidavit executed (some twenty-four years ago), and signed by the three then Selectmen of the Town of Branford, dated August 5, 1959, recite three procedures utilized by them, to give notice of the meeting of the voters in the area involved, relative to formation of the Plaintiff District. Defendant offered no satisfactory proof at the trial, to attack the contents, or veracity, of said Affidavit.

Defendant's final claim is that he never received any ". . . notice of meeting", in 1959. There is no showing that, under the pertinent statutes, personal service of the notice should have been made on Defendant, in 1959, as a condition of a valid formation of such a District, pursuant to Sec. 7-325, *Gen. Stats.*

III

Additional Comments

Essentially, Defendant is challenging the legal status of Plaintiff, as a proper entity to bring this action. It is highly doubtful whether this is a proper jurisdictional objection. It has been recently stated that a Motion to Dismiss cannot be used to challenge the competence of a corporation to commence an action. *T.K. Auto Rental* v. *Mahon*, 9 Conn. L. Trib. No. 35, p. 16, August 29, 1983.

The general procedures, relative to filing of a Motion to Dismiss, were discussed in *Chrysler Credit Corporation* v. *Fairfield Chrysler-Plymouth, Inc.*, et al., 180 Conn. 223, 227.

In *Monroe* v. *Monroe*, 177 Conn. 173, 185, the Court denied a claim of the Plaintiff, seeking to vacate a judgment of divorce. Plaintiff asserted that the Referee who conducted the hearing, without objection from the parties or their counsel, lacked jurisdiction over the subject matter of the divorce, because the record contained no valid Order of Reference to him. Rejecting this argument, in *Monroe*, the Supreme Court stated:

> "Such oversights are not jurisdictional defects for the purpose of collateral attack on a judgment." (p. 185).

In *Monroe*, the Court quoted, with approval, the case of *Lacks* v. *Lacks*, 41 N.Y. 2d 71, 74-77. It observed that Chief Judge Breitel, in *Lacks*, had noted, at length:

> " . . . the ambiguities inherent in the concept of subject matter jurisdiction." (p. 185).

In the instant case, Defendant did not sustain his burden of proof, so as to demonstrate clearly that there was, technically or otherwise, a lack of subject matter jurisdiction in this case.

In *Monroe*, the Court also stated:

> " . . . every presumption favors the jurisdiction of a court . . . ." (p. 177).

There is a presumption of the validity of liens, such as the instant tax lien. Defendant did not offer persuasive evidence to overcome that presumption. *Town of Wallingford* v. *Glen Valley Associates, Inc.*, 190 Conn. 158, 163.

Sec. 187, *Practice Book*, captioned, "Foreclosure of Municipal Liens", also states, in part, as follows:

> "Any claimed informality, irregularity, or invalidity in the assessment or attempted collection of the tax, or in the lien filed, shall be matter of affirmative defense, to be alleged and proved by the defendant."

IV

Conclusion

Defendant's Motion to Dismiss, (#129), dated March 30, 1984, is denied, in all respects.

/s/ LEVINE, J.
Levine, J.